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IN THE

Supreme Court of the United States

October Term, 1947.

No. 462

TRANSAMERICA CORPORATION, AND ITS OFFICERS AND DIRECTORS,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

No. 463

TRANSAMERICA CORPORATION, AND ITS OFFICERS AND DIRECTORS,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX TO PETITION.

	Page
Opinions Below	2
Jurisdiction	2
Statute and Rules Involved	2
Statement of the Case	2
Questions	7
Reasons for Granting the Writ	8
1. The Circuit Court of Appeals Has Decided Important Questions of Federal Law Which Have Not Been but Should Be Settled by This Court	8
2. The Questions Presented by This Petition Are Important in the Administration of the Securities Exchange Act of 1934 and the Proxy Rules	10
3. In Affirming the District Court's Judgment Which Broadly Enjoins Transamerica From Soliciting Proxies in Violation of Section 14 (a) of the Act and Rules X-14A-7 and X-14A-2, the Court Has Decided a Federal Question in a Way Probably in Conflict With the Principles Enunciated in National Labor Relations Board v. Express Publishing Co., 312 U. S. 426 (1941), and May Department Stores Co. v. National Labor Relations Board, 326 U. S. 376 (1945)	12

INDEX TO PETITION (Continued).

Page

4. In Holding That Transamerica Must Resolicit Proxies for an Adjourned 1946 Meeting, Even Though Its 1947 Meeting Already Has Been Held, the Circuit Court of Appeals Has Decided a Federal Question in a Way Probably in Conflict With the Principles Enunciated by This Court in Watts, Watts & Co. v. Unione Austriaca, Etc., 248 U. S. 9 (1918), and Public Utilities Comm'n of Ohio, et al. v. United Fuel Gas Co., et al., 317 U. S. 256 (1943) 13

Conclusion 16

Appendix. Provisions of Securities Exchange Act of 1934 17

TABLE OF CASES CITED.

Page

May Department Stores Co., doing business as Famous-Barr Co. v. National Labor Relations Board, mem., 324 U. S. 838 (1945); 326 U. S. 376 (1945) 7, 11, 12, 13

National Labor Relations Board v. Express Publishing Co., mem., 311 U. S. 638 (1940); 312 U. S. 426 (1941) 7, 11, 12

Otis & Co. v. Securities & Exchange Commission, et al., mem., 322 U. S. 724 (1944); 323 U. S. 624 (1945) 11

Public Utilities Comm'n of Ohio, et al. v. United Fuel Gas Co., et al., 317 U. S. 456, 466 (1943) 8, 14

Securities & Exchange Commission v. Chenery Corporation, et al., mem., 317 U. S. 609 (1942); 318 U. S. 80 (1943) 10

Securities & Exchange Commission v. C. M. Joinder Leasing Corporation, et al., mem., 318 U. S. 755 (1943); 320 U. S. 344 (1943) 11

Watts, Watts & Co. v. Unione Austriaca, etc., 248 U. S. 9, 21 (1918) 8, 14

STATUTES AND AUTHORITIES CITED.

	Page
House Committee Report No. 1383, 73rd Cong., 2d Sess.	8
Judicial Code, Section 240 (a) (26 Stat. 828 (1891), as amended, 28 U. S. C. § 347 (a)	2
N. L. R. A., Section 10 (c) (48 Stat. 926 (1934, as amended, 29 U. S. C. § 160 (c)	12
Revised Code of Delaware, 1935, § 2041	10
Revised Code of Delaware, 1935, § 2049	15
Securities Exchange Act of 1934, Section 27 (48 Stat. 902 (1934), as amended, 15 U. S. C. § 78aa)	2
Securities Exchange Act of 1934 (48 Stat. 881 (1934), as amended, 15 U. S. C. § 78a et seq.)	2, 17, 18
Senate Committee Report No. 792, 73rd Cong., 2d Sess.	8

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Transamerica Corporation, and its Officers and Directors, pray that Writs of Certiorari issue to the Circuit Court of Appeals for the Third Circuit to review final judgments of that Court entered on September 15, 1947.

OPINIONS BELOW.

The opinion of the District Court is reported in 67 F. Supp. 326, and the opinion of the Court of Appeals is reported in 163 F. (2d) 511.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended (26 Stat. 828 (1891), as amended, 28 U. S. C. § 347 (a)), which is made applicable by Section 27 of the Securities Exchange Act of 1934 (48 Stat. 902 (1934), as amended, 15 U. S. C. § 78aa).

The date of the judgments sought to be reviewed is September 15, 1947, and the date upon which this Petition for Writs of Certiorari is presented is December 2, 1947.

STATUTE AND RULES INVOLVED.

The pertinent provisions of the Securities Exchange Act of 1934 (48 Stat. 881 (1934), as amended, 15 U. S. C. § 78a) are set forth in the Appendix, *infra,* pp. 17-18. The Proxy Rules (Regulation X-14) are set forth in full in the Record (R. 88-112).

STATEMENT OF THE CASE.

The Commission brought an action against Transamerica, a Delaware corporation, charging that it was violating the Proxy Rules in soliciting proxies for its 1946 annual meeting. Transamerica's solicitation made it subject to Section 14 (a) of the Act which makes it unlawful for a person "to solicit any proxy * * * in contravention of such rules and regulations as the Commission may prescribe * * *." (*infra,* p. 17). The Commission did not challenge any part of Transamerica's Proxy Statement or its soliciting procedure, except the manner in which it dealt with the proposals of stockholder Gilbert, who owned

17 shares of Transamerica's stock out of approximately 10,000,000 shares outstanding.

In January 1946 Gilbert advised Transamerica that at the annual meeting of stockholders to be held in April he intended to propose (R. 10a-13a):

(1) a By-Law amendment to permit stockholders to elect auditors.

(2) an amendment to eliminate from By-Law 47 the requirement that By-Law changes must be included in the notice of meeting before being acted upon by stockholders.

(3) a "straight resolution" (Gilbert's words), involving no by-law amendment, to require Transamerica to send to all stockholders a summary of the proceedings at stockholders' meetings.

The Commission asserted that under its Rules, if Transamerica solicited proxies for the election of directors, it must also solicit and vote its proxies on Gilbert's proposals (R. 29a, 31a).

The pertinent Rules pertaining to the duties of solicitation and to the contents of proxy statements and proxies, provide (R. 93, 89, 112):

Rule X-14A-7.

"In the event that a qualified security holder of the issuer has given the management reasonable notice that such security holder intends to present for action at a meeting of security holders of the issuer a proposal which is a proper subject for action by the security holders, the management shall set forth the proposal and provide means by which security holders can make a specification *as provided in Rule X-14A-2.* Further, if the management opposes such proposal, it shall, upon the request of such security holder, include in its soliciting material the name and address of such se-

curity holder and a statement of such security holder setting forth the reasons advanced by him in support of such proposal: * * *."[1]

Rule X-14A-2.

"Means shall be provided in the form of proxy whereby the person solicited is afforded an opportunity to specify by ballot a choice between approval or disapproval of each matter, or each group of related matters as a whole, *which is intended to be acted upon pursuant to the proxy* and the authority conferred as to each such matter or group of matters shall be limited to voting in accordance with the specifications so made. * * *"

Item 18 of Schedule 14A.

"If the persons making the solicitation are informed that any other person intends to present any matter for action at any meeting of security holders at which action pursuant to the proxy is to be taken, and *if the persons making the solicitation intend that such matter shall not be acted upon pursuant to the proxy,* make a statement to that effect, identifying the matter and indicating the disposition proposed to be made thereof at the meeting in the event the disposition thereof is within the control of the persons making the solicitation."[2]

These Rules provide, in effect, that if Transamerica intended to act on Gilbert's proposals under its proxies (which it did not), it was required to set out the proposals in its proxy statement, to give the stockholders an opportunity to specify in the proxies how they desired their stock to be voted, and if it opposed the proposals, to set out in its proxy statement Gilbert's name, address and reasons for his proposals; but if Transamerica did not intend to

(1) All italics supplied unless otherwise indicated.
(2) Item 18 is applicable to management solicitation. Rule X-14A-9(h) so provides (R. 97).

act upon Gilbert's proposals under its proxies (which was the fact), it was only required to make a statement to that effect (which it did). Rule X-14A-6 (b) recognizes that a corporation may not wish to solicit proxies upon a stockholder's proposal and provides the means whereby a stockholder may solicit his own proxies through the corporation as an intermediary (R. 93). Gilbert did not attempt to follow the procedure specified in Rule X-14A-6.

The Commission contended that the above Rules made it mandatory for Transamerica to solicit proxies on Gilbert's proposals, to vote its proxies for or against the proposals as the stockholders directed, and that Transamerica should therefore conform its soliciting material to Rules X-14A-7 and X-14A-2 (R. 29a, 31a).

Transamerica pointed out that the proposed By-Law amendments could not be validly acted upon at the meeting since the notice of meeting made no reference to the amendments, and under By-Law 47 the By-Laws could not be changed without notice.[3] It also stated that as a matter of principle it would be wrong to require the Corporation to insert in its notice any by-law amendment that any one of its 150,000 stockholders might propose (R. 35a). As to the "straight resolution", Transamerica stated that the directors, and not the stockholders, were authorized to determine whether corporate moneys should be spent to print and mail to stockholders a summary of the meeting (R. 27a, 28a). Consequently, Transamerica advised the Commission that Gilbert's proposals were not proper subjects for stockholders to act upon, and if they were presented at the meeting, they would be ruled out of order (R. 27a). Since Transamerica did not intend to act upon Gilbert's proposals under its proxies, it conformed its soliciting material to the requirements of Item 18 (R. 18a, 55a).

When Transamerica began to solicit proxies for directors, without soliciting upon Gilbert's proposals, the Com-

(3) In its brief filed in the Circuit Court of Appeals, the Commission admitted the validity of By-Law 47.

mission sought an injunction in the District Court of Delaware (Leahy, J.) against holding the meeting except for purposes of adjournment (R. 5a, 43a). Upon motion for a preliminary injunction, the Court permitted the meeting to be held for the election of directors, but ordered that the meeting thereupon be adjourned (R. 56a). Later, the Court entered a judgment (based upon the Commission's motion for summary judgment) which (i) upheld Transamerica's action regarding Gilbert's proposed amendment to By-Law 47 and his proposed "straight resolution"; (ii) directed Transamerica to mail to all stockholders (including 1300 outside the United States from whom Transamerica had solicited no proxies) a notice of an adjourned 1946 annual meeting to be held for the stated purpose of considering the auditor proposal; (iii) directed Transamerica to solicit proxies on the auditor proposal from all previously solicited stockholders and to vote such proxies at the adjourned meeting; and (iv) enjoined Transamerica from soliciting proxies "without fully complying with Section 14 (a) of the Securities Exchange Act of 1934 and Proxy Rules X-14A-7 and X-14A-2 thereunder"[4] (R. 81a).

From this judgment, cross appeals were taken to the Circuit Court of Appeals. Meanwhile, pursuant to an order of the District Court, Transamerica has been keeping its 1946 Annual Meeting open by adjourning it for successive periods of thirty days (R. 87a).

The appeals were argued on January 23, 1947. On September 15, 1947 (*after the 1947 annual meeting had been held*),[5] the Circuit Court rendered an opinion requiring Transamerica to solicit and vote proxies on all of Gilbert's

(4) This general prohibition is followed by the statement that it applies "more particularly" to proxy solicitation in connection with any proposal of a stockholder which "has to do with the election of independent auditors by the stockholders" (R. 82a). *This latter specification, however, does not restrict the sweep of the more general language which precedes it* (R. 81a).

(5) Since the case was decided by the District Court in 1946, the record does not disclose the holding of the 1947 meeting. It is believed, however, that the Court is justified in taking judicial notice that the 1947 meeting was held inasmuch as Transamerica's By-Law 4 specifies that annual meetings shall be held on the last Thursday in April in each year (R. 123).

proposals *at an adjourned 1946 meeting,* and affirming the injunctive provision of the District Court's judgment (R. 127).

QUESTIONS.

1. Does the Commission have power to adopt Rules making it mandatory for a corporation which desires to solicit proxies solely for the election of directors, likewise to solicit proxies upon proposals submitted by stockholders?

2. Do the Rules adopted by the Commission create such a duty?

3. Does the Court have power to compel Transamerica to embody reference to stockholders' proposals in a notice of meeting (not a part of a Proxy Statement) when (i) neither the Act nor the Proxy Rules contains any requirement as to the contents of notices; (ii) some of the notices are sent to stockholders from whom no proxies are solicited for any purpose; and (iii) Section 27 of the Act authorizes the Court only "to enforce any liability or duty created by this title or rules and regulations thereunder * * *"?

4. Were Gilbert's proposals "a proper subject for action" by stockholders within the meaning of Rule X-14A-7?

5. Does the judgment which broadly enjoins Transamerica from soliciting proxies in violation of Section 14 (a) of the Act and Rules X-14A-7 and X-14A-2 conflict with the principles enunciated by this Court in *National Labor Relations Board v. Express Publishing Co.,* 312 U. S. 426 (1941), and *May Department Stores Co., d. b. a. Famous-Barr Co. v. National Labor Relations Board,* 326 U. S. 376 (1945), which require that an injunction be limited to violations of the kind actually proven, or reasonably anticipated by virtue of past conduct?

6. In holding that Transamerica must resolicit proxies for an adjourned 1946 meeting, even though its 1947 meeting already has been held, has the Court departed from the

principle enunciated in *Watts, Watts & Co. v. Unione Austriaca, etc.*, 248 U. S. 9, 21 (1918), and *Public Utilities Comm'n of Ohio, et al. v. United Fuel Gas Co., et al.*, 317 U. S. 456, 466 (1943), which requires an appellate court to dispose of a case on the basis of facts which exist at the time of its decision?

REASONS FOR GRANTING THE WRIT.

1. The Circuit Court of Appeals Has Decided Important Questions of Federal Law Which Have Not Been but Should Be Settled by This Court.

The net effect of the decision of the Circuit Court is to compel a corporation which desires to solicit proxies only for directors, also to solicit proxies upon proposals submitted by stockholders. If the Rules are susceptible of this construction (and it is believed they are not), then the Rules are unauthorized by the Act, since the Act imposes no affirmative duty to solicit but simply prohibits solicitation "in contravention of such rules and regulations as the Commission may prescribe" (*infra*, p. 17). The purpose of the Act was simply to require disclosure by management concerning matters upon which the solicited proxies were to be used, not to compel solicitation.

Senate Committee Report No. 792, 73d Cong., 2d Sess. states:

> "Too often proxies are solicited *without explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought.* • • • The Committee recommends that the solicitation and issuance of proxies be left to regulation by the Commission."

House Committee Report No. 1383, 73d Cong., 2d Sess. states:

> "Insiders have at times solicited proxies *without fairly informing the stockholders of the purposes for*

> ***which the proxies are to be used and have used such proxies to take from the stockholders for their own selfish advantage valuable property rights.*** * * * For this reason the proposed bill gives * * * Commission power to control the conditions under which proxies may be solicited * * *."

The Commission at one time apparently recognized that under the Act it had no authority to dictate the matters to be submitted to stockholders, but that its power was limited to requiring fair disclosure as to all matters upon which proxies were to be voted. S. E. C. Release 1823, under the Securities Exchange Act of 1934 issued on August 11, 1938, states:

> "The new regulation does not prescribe in any way what matters should be submitted to a vote of security holders, but it is based upon the principle that when a question is presented to security holders for their specific action the essential information should be furnished them so far as is possible."

A further effect of the decision of the Circuit Court is to repose in the Commission the power to dictate the terms of a notice of meeting (not a part of the proxy statement) which is sent to stockholders from whom no proxies are solicited, even though the Rules neither specify what the notice must contain, nor require the notice to be filed prior to solicitation (R. 91). As to the contention of the Commission that Transamerica was under a duty *by virtue of Delaware law* to include in its notice of meeting Gilbert's proposed By-Law amendments (R. 32a-33a) (which Transamerica denies),[6] it would seem clear that neither

(6) The District Court upheld Transamerica's interpretation of the Delaware law, saying (R. 70a):

> "There is nothing in the General Corporation Law of Delaware or in the charter or by-laws of Transamerica Corporation which requires it to give stockholders notice of any by-law amendment which a shareholder desires to submit at an annual meeting."

The Circuit Court did not pass upon this point.

the Commission nor the Court has the authority to enforce a duty allegedly arising under State law, in the present proceedings. Section 27 of the Act authorizes the Court only "to enforce any liability or duty *created by this title or rules and regulations thereunder* * * *" (*infra*, p. 17).

In addition, since under the Corporation Law of Delaware (Revised Code of Delaware 1935, § 2041) and Transamerica's Charter and By-Laws (R. 49a, 50a), the management of Transamerica is vested in its directors, it would seem self-evident that the directors alone were authorized to determine whether corporate money should be expended pursuant to Gilbert's "straight resolution" which Gilbert specified was not to be in the form of a By-Law amendment (R. 13a). Yet, under the decision of the Circuit Court, the directors are to be divested of their authority to act on the straight resolution and that power is reposed in the stockholders.

Every corporation with securities listed on a national securities exchange is subject to the Proxy Rules if it solicits proxies. Manifestly, it is of great importance not only to the management and stockholders, but to the administrators of the Act as well, to have this Court definitively determine the questions presented by this Petition.

2. The Questions Presented by This Petition Are Important in the Administration of the Securities Exchange Act of 1934 and the Proxy Rules.

Petitions for certiorari appear uniformly to have been granted whenever the questions presented are important in the administration of a regulatory act.

> *Securities & Exchange Commission v. Chenery Corporation, et al.*, mem., 317 U. S. 609 (1942); 318 U. S. 80 (1943) (involving Public Utility Holding Company Act);

Otis & Co. v. Securities & Exchange Commission, et al., mem., 322 U. S. 724 (1944); 323 U. S. 624 (1945) (involving Public Utility Holding Company Act);

Securities & Exchange Commission v. C. M. Joinder Leasing Corporation, et al., mem., 318 U. S. 755 (1943); 320 U. S. 344 (1943) (involving Securities Act of 1933);

National Labor Relations Board v. Express Publishing Co., mem., 311 U. S. 638 (1940); 312 U. S. 426 (1941) (involving N. L. R. A.);

May Department Stores Co., doing business as Famous-Barr Co. v. National Labor Relations Board, mem., 324 U. S. 838 (1945); 326 U. S. 376 (1945) (involving N. L. R. A.).

The case at bar involves, *inter alia*, the scope of the injunction which has been issued against Transamerica (*infra*, p. 12) which is directly analogous to the question which caused the Court to grant certiorari in the *May Department Stores* case. The Court in the latter case said (pp. 377-378):

> "The petition for the writ presented issues • • • as to the propriety of a Board order to cease and desist generally from unfair labor practices instead of an order to cease and desist only from the type or types of unfair practices which the Board found the employer committed. As these issues presented important problems in the administration of the National Labor Relations Act, certiorari was granted 324 U. S. 838."

3. In Affirming the District Court's Judgment Which Broadly Enjoins Transamerica From Soliciting Proxies in Violation of Section 14 (a) of the Act and Rules X-14A-7 and X-14A-2, the Court Has Decided a Federal Question in a Way Probably in Conflict With the Principles Enunciated in National Labor Relations Board v. Express Publishing Co., 312 U. S. 426 (1941), and May Department Stores Co. v. National Labor Relations Board, 326 U. S. 376 (1945).

Paragraph 3 of the judgment of the District Court (affirmed by the Circuit Court of Appeals) broadly enjoins Transamerica from soliciting proxies "without complying fully with Section 14 (a) of the Securities Exchange Act of 1934 and Proxy Rules X-14A-7 and X-14A-2 thereunder * * *" (R. 82a). The sweep of the injunction, it is believed, conflicts with the principles enunciated in *National Labor Relations Board v. Express Publishing Co.*, 312 U. S. 426 (1941), and *May Department Stores Co. v. National Labor Relations Board*, 326 U. S. 376 (1945). In the *Express Publishing Co.* case, the Court held that the National Labor Relations Board was without authority under Section 10 (c) of the N. L. R. A. to order an employer to cease and desist both from refusing to bargain collectively, and from interfering with the rights of its employees guaranteed by Section 7 of the Act, when it appeared that the employer had been guilty only of the first offense.[7]

In *May Department Stores Company v. National Labor Relations Board, supra*, the Court held that (p. 392):

> "without a clear determination by the Board of an attitude of opposition to the purposes of the Act to

(7) Section 10(c) of the N. L. R. A. provides that if, after hearing "* * * the Board shall be of the opinion that any person named in the complaint has engaged in or is about to engage in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice * * *." (48 Stat. 926 (1934), as amended, 29 U. S. C. § 160(c).)

Section 10(c) of the N. L. R. A. is substantially similar to Section 21(e) of the Securities Exchange Act of 1934 (*infra*, p. 17).

> protect the rights of employees generally, the decree need not enjoin Company actions which are not determined by the Board to be so motivated"

and that the Courts called upon to enforce orders may examine their scope to see whether, on the evidence, as a matter of law they go beyond the authority of the Board.

In the case at bar, neither the District Court nor the Circuit Court found that Transamerica had adopted an attitude of general opposition to the purpose of the Act or the Rules. The pending case is the only one in which Transamerica has ever been charged with violating the Act or the Rules and the District Court held that Transamerica's interpretation of the Rules was proper as to two of Gilbert's proposals. Consequently, the question arises whether one who in good faith submits to judicial determination a substantial issue under the Proxy Rules, does so at the risk, if unsuccessful, of being found in contempt at some remote future time with regard to issues unrelated to those adjudged.

The scope of the injunction, it is believed, violates the principles enunciated by this Court in the *Express Publishing Co.* and the *May Department Stores* cases.

4. In Holding That Transamerica Must Resolicit Proxies for an Adjourned 1946 Meeting, Even Though Its 1947 Meeting Already Has Been Held, the Circuit Court of Appeals Has Decided a Federal Question in a Way Probably in Conflict With the Principles Enunciated by This Court in Watts, Watts & Co. v. Unione Austriaca, Etc., 248 U. S. 9 (1918), and Public Utilities Comm'n of Ohio, et al. v. United Fuel Gas Co., et al., 317 U. S. 256 (1943).

Between the time when the appeals were argued in the Circuit Court of Appeals and the date when the opinion was rendered by the Court, Transamerica held its 1947 meeting. Nevertheless, the Circuit Court of Appeals held

that Transamerica must resolicit proxies upon all of Gilbert's proposals for an adjourned 1946 meeting, merely to enable one person holding 17 shares of stock to present his proposals for consideration. The magnitude of this requirement is manifest for Transamerica has approximately 150,000 stockholders holding almost 10,000,000 shares of stock (R. 116-117).

In *Watts, Watts & Co. v. Unione Austriaca, etc.*, 248 U. S. 9 (1918), this Court said (p. 21):

> "This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but *to make such disposition of the case as justice may at this time require.* Butler v. Eaton, 141 U. S. 240; Gulf, Colorado & Santa Fe Ry. Co. v. Dennis, 224 U. S. 503, 506. *And in determining what justice now requires the court must consider the changes in fact and in law which have supervened since the decree was entered below.* United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft, 239 U. S. 466, 475, 478, Berry v. Davis, 242 U. S. 468; Crozier v. Krupp, 224 U. S. 290, 302; Jones v. Montague, 194 U. S. 147; Dinsmore v. Southern Express Co., 183 U. S. 115, 120; Mills v. Green, 159 U. S. 651; The Schooner Rachel v. United States, 6 Cranch 329; United States v. The Schooner Peggy, 1 Cranch 103, 109-110."

In *Public Utilities Comm'n of Ohio, et al. v. United Fuel Gas Co., et al.*, 317 U. S. 456, 466 (1943), the Court said:

> "* * * It is the case that is here now that must be decided, and *it must be decided on the basis of the circumstances that exist now.* Cf. Vendenbark v. Owens-Illinois Co., 311 U. S. 538, 542-543, and cases there cited."

These decisions, it is believed, make it mandatory for an appellate court to take into consideration changes in

circumstances which have occurred between the date of the decision by the trial court and the time when the appellate court renders its decision. The Circuit Court of Appeals has failed to heed the admonitions of these decisions by requiring Transamerica to resolicit proxies for an adjourned 1946 meeting, even though its 1947 meeting already has been held.

The unreasonableness of this requirement is emphasized by the fact that under Delaware law the persons entitled to notice of, and to vote at, an adjourned meeting are the same persons who were entitled to vote at an original meeting. Section 17 of the General Corporation Law authorizes directors to fix a record date for determining stockholders entitled to notice of, and to vote at a meeting, and then provides that (Revised Code of Delaware 1935, § 2049):

> "* * * only such stockholders as shall be stockholders of record on the date so fixed shall be entitled to such notice of, and to vote at, such meeting *and any adjournment thereof* * * *."

A resolicitation of proxies upon Gilbert's proposals, therefore, will mean that persons who were stockholders of record on March 30, 1946 (R. 20a) will be the only persons entitled to vote at the adjourned meeting, which of necessity will be held sometime in 1948. This means that many persons who have long ceased to be stockholders will be entitled to vote, whereas numerous persons who have become stockholders in the interim will be disenfranchised. The inequity of requiring solicitation under such circumstances would appear manifest, particularly as Gilbert is free to submit his same proposals at the next annual meeting which will follow the final decision in this case. At that time Transamerica will be subject to whatever ruling is ultimately determined upon herein.

CONCLUSION.

Wherefore, the Petitioners pray that the Petition for Writs of Certiorari be granted, that the cause be reviewed, and that the judgments of the Circuit Court of Appeals for the Third Circuit be reversed.

Respectfully submitted,

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APPENDIX.

Provisions of Securities Exchange Act of 1934.

Section 14 (*a*) [48 Stat. 895 (1934), 15 U. S. C. § 78n (a)]:

"It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange or otherwise, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Section 21 (*e*) [48 Stat. 899 (1934), as amended, 15 U. S. C. § 78u (e)]:

"Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule or regulation thereunder, it may in its discretion bring an action in the proper district court of the United States, the district court of the United States for the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, * * *."

Section 27 [48 Stat. 902 (1934), as amended, 15 U. S. C. § 78aa]:

"The district courts of the United States, the district court of the United States for the District of

Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. * * *."

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On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

REPLY BRIEF OF PETITIONER.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1947.

No. 462.

TRANSAMERICA CORPORATION, AND ITS OFFICERS AND DIRECTORS,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

No. 463.

TRANSAMERICA CORPORATION, AND ITS OFFICERS AND DIRECTORS,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

REPLY BRIEF OF PETITIONER.

In its brief, Respondent has assumed (Res. Br. 20) that Petitioner has abandoned its contention (urged in both lower courts) that the Proxy Rules do not make it mandatory for management to solicit proxies upon stockholders' proposals merely because management desires to solicit proxies for the election of directors. This assumption is an erroneous one.

The petition squarely presents the question whether, as a matter of construction, the Proxy Rules make it mandatory for a corporation which desires to solicit proxies solely for the election of directors, likewise to solicit proxies upon proposals submitted by stockholders (Pet. 7, Question 2). The importance of a determination of this question by this Court is one of the reasons urged by Transamerica for the issuance of certiorari (Pet. 8, 10, Reasons 1 and 2).

Respondent's suggestion that this question is unsubstantial is likewise unjustified (Res. Br. 20). Rules X-14A-7 and X-14A-2, by their terms, are applicable only when management intends to act upon a stockholder's proposal under the proxies which it solicits (Pet. 3, 4). On the other hand, Item 18 of Schedule 14A prescribes what must be included in a proxy statement when management does not intend to act upon a stockholder's proposal under the proxies which it solicits (Pet. 4). Implicit in these Rules is the right of management to determine whether, in soliciting proxies for the election of directors, it will also solicit proxies with respect to stockholders' proposals, or whether it will refrain from doing so and leave stockholders to their solicitation remedy under Rule X-14A-6.

Beyond this, Respondent's brief requires no comment.

For the reasons stated in the petition, this Court, it is believed, is clearly warranted in granting the review which petitioner seeks.

Respectfully submitted,

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and Rules involved	3
Statement	3
Argument	8
Conclusion	20

CITATIONS

Cases:

Boise City Irr. & Land Co. v. *Clark*, 131 Fed. 415 — 16

May Department Stores Co. v. *National Labor Relations Board*, 326 U. S. 376 — 14

McGrain v. *Daugherty*, 273 U. S. 135 — 16

National Labor Relations Board v. *Express Publishing Co.*, 312 U. S. 426 — 14, 15

Southern Pacific Terminal Co. v. *Interstate Commerce Commission*, 219 U. S. 498 — 16

Statutes and Rules:

Securities Exchange Act of 1934, 48 Stat. 895, 15 U. S. C. 78n (a):

Section 2 — 11

Section 14 (a) — 3, 9, 10, 11, 12

Regulation X–14 (A):

1 — 4

2 — 4

4 — 4

5 — 4

7 — 3, 5, 7, 9, 10, 20

Schedule 14A — 4

Miscellaneous:

5 Fletcher on Corporations (1931 Ed.) § 2097 — 20

8 Fletcher on Corporations (1931 Ed.):

§§ 4166–67, 4170–72, 4177–78 — 20

H. Rep. No. 1383, 73d Cong., 2d Sess. (1934):

Pp. 3, 5 — 11

P. 5 — 12

Pp. 13–14 — 12

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TRANSAMERICA CORPORATION AND ITS OFFICERS AND DIRECTORS, PETITIONERS

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SECURITIES AND EXCHANGE COMMISSION

No. 463

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v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the District Court (R. 62a–75a, 79a–80a) are reported in 67 F. Supp. 326, and the opinion of the Circuit Court of Appeals (R. 116–27) is reported in 163 F. 2d 511.

JURISDICTION

The judgments of the Circuit Court of Appeals with respect to which the writs of certiorari are sought were rendered on September 15, 1947 (R. 128–29). Petitioners invoke the jurisdiction of

this Court under Section 240 (a) of the Judicial Code, 26 Stat. 828, as amended, 28 U. S. C. 347 (a), which is made applicable by Section 27 of the Securities Exchange Act of 1934, 48 Stat. 902, 15 U. S. C. 78aa.

QUESTIONS PRESENTED

1. Whether the Commission's Rule X–14A–7, promulgated under the Securities Exchange Act of 1934, is invalid to the extent that it imposes as a condition to proxy solicitation by a corporate management the requirement that the management permit stockholders to vote, by means of the proxy, upon proposals submitted by an independent stockholder in accordance with the provisions of the Rule.

2. Whether, under Delaware law, the stockholders of a Delaware corporation may properly act upon a resolution that an account of the proceedings at the annual meeting be sent to all the stockholders of the corporation.

3. Whether the judgment of the District Court, as affirmed by the Circuit Court of Appeals, is invalid on the following grounds: (a) because it is too broad; (b) because it does not take account of changed circumstances; (c) because it directs the inclusion of a stockholder's proposals in the notice of meeting notwithstanding the fact that the Commission's proxy rules do not expressly deal with the contents of a notice of meeting; (d) because it directs the sending of a notice of meeting to persons not solicited for their proxies;

and (e) because it is concerned with the enforcement of an alleged State-created right.

STATUTE AND RULES INVOLVED

The statutory provision involved is Section 14 (a) of the Securities Exchange Act of 1934, 48 Stat. 895, 15 U. S. C. 78n (a) ("The Act"), which confers upon the Securities and Exchange Commission ("the Commission") authority to make rules and regulations governing solicitation of proxies in respect of any security registered on a national securities exchange. The rule most particularly involved is Rule X–14A–7, dealing with proposals of independent security holders. The provisions of Section 14 (a) and of Rule X–14A–7 are set forth, and the proxy rules are described generally, at pp. 3–5, *infra*.

STATEMENT

The instant proceeding began as an injunction action instituted by the Commission to enforce compliance with rules it has promulgated under Section 14 (a) of the Securities Exchange Act of 1934. That section provides as follows:

> It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange or otherwise to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted se-

> curity) registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

The rules prescribed by the Commission under this Section are entitled "Regulation X–14" and are printed in their entirety at R. 88–112. The rules are designed not only to ensure that security holders shall be fully informed concerning matters that will arise at the annual meeting but also to ensure that their voting rights shall be effective. Proxies may not be solicited unless the security holders are furnished with a proxy statement which shall have been submitted to the Commission at least ten days prior to mailing.[1] The proxy statement must contain information on a variety of matters relevant to the exercise of an informed judgment.[2] It must not be misleading in any material respect.[3] And, under Rule X–14A–2 (R. 89–90), the various matters to be acted upon at the meeting pursuant to the proxy must be set forth in ballot form so that the security holders may be afforded an opportunity to vote approval or disapproval of each specific item. The Rule most immediately in-

[1] Rules X–14A–1, X–14A–4 (R. 88, 91).
[2] Schedule 14A (R. 97–112).
[3] Rule X–14A–5 (R. 92).

volved is Rule X–14A–7, which provides in pertinent part:

> In the event that a qualified security holder of the issuer has given the management reasonable notice that such security holder intends to present for action at a meeting of security holders of the issuer a proposal which is a proper subject for action by the security holders, the management shall set forth the proposal and provide means by which security holders can make a specification as provided in rule X–14A–2. Further, if the management opposes such proposal, it shall, upon the request of such security holder, include in its soliciting material the name and address of such security holder and a statement of such security holder setting forth the reasons advanced by him in support of such proposal: *Provided, however,* That a statement of reasons in support of a proposal shall not be longer than 100 words: *And provided further,* That such security holder and not the management shall be responsible for such statement.

Transamerica Corporation, a Delaware corporation, has outstanding approximately 9,935,000 shares of $2 par value capital stock, which are registered with the Commission and listed on the New York Stock Exchange, the Los Angeles Stock Exchange, and the San Francisco Stock Exchange, all of which are national securities ex-

changes (R. 21a). The shares are held by approximately 151,000 shareholders (R. 53a).

John J. Gilbert, a duly qualified stockholder of Transamerica Corporation, early in January 1946, by letter to the management, submitted four proposals which he stated his intention to present for action by shareholders at the next annual stockholders' meeting, to be held on the last Thursday in April 1946. The proposals were as follows (R. 10a–13a):

(1) To have the independent public auditors of the books of the corporation elected by the stockholders.

(2) To amend By-Law 47 so as to eliminate therefrom the requirement that notice of any proposed alteration or amendment of the By-Laws be contained in the notice of meeting. (Gilbert made it clear in his communication to the company (R. 10a–13a) that his purpose was not to prevent actual notice of such matters to the security holders—notice being assured in any event under the Commission's proxy rules. His purpose, as he stated, was to prevent the management from exercising its asserted power to block action on stockholders' proposals by the technical device of excluding such proposals from the notice of meeting.)

(3) To change the place of annual meeting of the corporation from Wilmington, Delaware, to San Francisco, California.

(4) To require that an account of the proceedings of the annual meeting be sent to all stockholders of the corporation.

The directors of Transamerica took the position, in correspondence with the Commission, that these proposals were not proper subjects for action by the security holders within the meaning of the Commission's Rule X–14A–7. The Commission stated that in its view they were proper (R. 26a–42a). Accordingly, when the management, in disregard of the Commission's advice, mailed out its soliciting material without setting forth the proposals in compliance with Rule X–14A–7, the Commission sought injunctive relief in the District Court of the United States for the District of Delaware.[4]

The District Court permitted the meeting to be convened for the transaction of ordinary business but ordered that it thereafter be adjourned pending determination by the court as to whether Gilbert's proposals were proper subjects for action by the security holders (R. 56a–57a). The court subsequently ruled that the proposal dealing with the election of auditors was a proper

[4] Gilbert's proposals were described in the proxy soliciting material under the provisions of Item 18 of Schedule 14A (R. 112). The management did not, however, print the statement not exceeding 100 words which Gilbert had submitted in support of each proposal, and, more important, the management did not afford the security holders an opportunity to vote on the proposals—all in contravention of the provisions of Rule X–14A–7.

subject for action by the security holders, but that the other proposals were not (R. 62a–75a, 79a–80a).[5] The court ordered resolicitation of the security holders on the auditor proposal, but this mandate has been stayed during the pendency of appellate proceedings.

Cross appeals were taken to the Circuit Court of Appeals for the Third Circuit by the Commission and by the petitioners. The Circuit Court of Appeals sustained the Commission's position as to all of Gilbert's proposals, and also sustained the final judgment of the District Court against various technical objections advanced by the Transamerica management. Thus, the position of the Commission was fully upheld on both appeals.

ARGUMENT

As appears from the opinions of the courts below, the principal argument of the petitioners in the previous stages of the case was that a proposed By-Law amendment which is an otherwise proper subject for action by the security holders under State law can be rendered improper by the simple device of excluding it from the notice of meeting. Such exclusion, it was argued, would make it mandatory for the management to rule the proposal "out of order" at the meeting by

[5] Prior to the institution of the District Court proceeding the directors had themselves adopted the third proposal, dealing with the place of meeting, so that issue has been mooted.

virtue of a requirement under State law that proposed By-Law amendments be set forth in the notice of meeting. The consequence, it was said, was that a proposal so excluded could not be deemed to be a "proper subject for action by the security holders" within the meaning of Rule X–14A–7.

The court below rejected this view of the Rule, accepting the Commission's construction that the term "proper subject for action by the security holders" embraced all proposals which are within the compass of stockholder action under State law without reference to procedural devices which might be employed under State law to prevent such action. The court ruled that even if the particular blocking device adopted in the present case were not actually invalid under State law, it could not be employed to render nugatory the overriding federal policy represented by Section 14 (a) of the Securities Exchange Act and Rule X–14A–7 thereunder.

This basic issue appears to have been dropped for purposes of the petition for writs of certiorari, and is mentioned here only for the light that it sheds on many of the minor points that are relied upon. The enumeration in the petition of Questions Involved includes the question "Were Gilbert's proposals 'a proper subject for action' by stockholders within the meaning of Rule X–14A–7?" (Pet. 7). However, this issue

is not adverted to in the discussion of Reasons for Granting the Writs, except that the last proposal, dealing with a report to the stockholders of the proceedings at the annual meeting, is said to be beyond the powers of the stockholders under Delaware law.

While the District Court and the Circuit Court of Appeals took a somewhat different approach to the construction of Rule X–14A–7, they were wholly in accord in overruling a large number of objections which, presumably because the courts thought them insubstantial, are the subject of little or no discussion in the written opinions. It is these secondary objections, or rather a selected few of them which appear to constitute the sole basis for the present petition. They are discussed below *seriatim*. We think that these objections are in fact insubstantial, that the asserted conflicts with decisions of other circuits and of this Court concerning some of the points do not exist, and that, except in the case of the first of the objections, which is an assault upon the validity of Rule X–14A–7, no questions of public interest are presented.

1. It is argued that Rule X–14A–7 is unauthorized by Section 14 (a) of the Act. Section 14 (a), it is noted, does not expressly impose a duty upon a management to solicit proxies upon stockholders' proposals, but provides only that solicitation of proxies (by any person) may not be undertaken "in contravention of such rules and

regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." It is argued, in effect, that under this standard the only conditions precedent to solicitation which the Commission may impose are conditions designed to ensure "disclosure * * * concerning matters upon which the solicited proxies were to be used * * *" (Pet. 8).

Such a construction is not justified by the language of Section 14 (a) or by its legislative history, and would frustrate fulfillment of the Congressional design embodied in the statute. The ruling of the court below on this issue is correct, and there is no suggestion of conflict of decisions.

The Securities Exchange Act is a many-sided statute which was designed to stabilize the national economy against the shocks produced by a faulty investment system in need of adjustment to modern conditions.[6] Basic to the problem, the Congress believed, was the development of large corporations, the geographical diffusion of their security holders, and the evils that ensued from the divorce of ownership from control.[7] It was

[6] See Statement of Purposes in Section 2 of the Act.

[7] H. Rep. No. 1383, 73d Cong., 2d Sess. (1934), 3, 5. It is interesting to note that all the directors of Transamerica are the beneficial owners of only one-half of one percent of the outstanding securities (R. 15a–16a). This includes 21,500 shares held by a trust managed by L. M. Giannini (R. 16a).

thought that investor confidence could not be restored until corporate trustees more adequately represented their *cestuis* and were rendered amenable to internal controls.[8] Accordingly, among other remedies, Congress adopted Section 14 (a) in an attempt to restore "fair corporate suffrage" by employing the federal power to curb abuses of the proxy machinery by which entrenched minorities had denied to security holders any effective voice in the management of their corporations.[9]

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[8] H. Rep. No. 1383, 73d Cong., 2d Sess. (1934) 5.

[9] The problem was put as follows by the House Committee on Interstate and Foreign Commerce (H. Rep. No. 1383, 73d Cong., 2d Sess. (1934) 13–14): "Fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange. Managements of properties owned by the investing public should not be permitted to perpetuate themselves by the misuse of corporate proxies. Insiders having little or no substantial interest in the properties they manage have often retained their control without an adequate disclosure of their interest and without an adequate explanation of the management policies they intend to pursue. Insiders have at times solicited proxies without fairly informing the stockholders of the purposes for which the proxies are to be used and have used such proxies to take from the stockholders for their own selfish advantage valuable property rights. Inasmuch as only the exchanges make it possible for securities to be widely distributed among the investing public, it follows as a corollary that the use of the exchanges should involve a corresponding duty of according to shareholders fair suffrage. For this reason the proposed bill gives the Federal Trade Commission power to control the conditions under which proxies may be solicited with a view to preventing the recurrence of abuses which have frustrated the free exercise of the voting rights of stockholders."

So far as is relevant here, the position of the Commission, in brief, is that if the Congressional design is to be made effective the security holders should be informed not only concerning the items the management will vote *for,* but also the items (presented by minority groups) that the management will vote *against;* and, further, that the security holders should be afforded an opportunity to instruct the persons soliciting their proxies as to their wishes on each specific matter to be proposed at the meeting. Only in this manner can the proxy machinery perform the function of providing a reasonable substitute for the earlier "town-meeting" form of corporate meeting which has been rendered impossible by modern conditions of corporate growth and the wide distribution of corporate securities. Nevertheless, the Transamerica management objects to being instructed by the solicited security holders as to how to vote except on items of business which it, the management proposes, even where it knows, on the basis of formal notice, that other proposals will be tendered by stockholders for consideration at the meeting.

There has been no showing that such an extraordinary gap in the protective scheme is envisioned in the language of the statute or in its legislative history. Under the circumstances it seems to us that to state the argument is to refute it.

2. Petitioners argue that because they have been found to have violated Rule X–14A–7 only as to Gilbert's proposals, paragraph (3) of the District Court's order (affirmed by the Circuit Court of Appeals), enjoining the petitioners from soliciting proxies "without complying fully with Section 14 (a) of the Securities Exchange Act of 1934 and Proxy Rules X–14A–7 and X–14A–2 thereunder" (R. 82a), is too broad. The "sweep of the injunction" is said to be in conflict with the principles enunciated in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, and *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376. These cases state the familiar rule that a court or agency may not as a matter of course "enjoin violations of all the provisions of the statute merely because the violation of one has been found."[10] On the other hand, these cases also recognize that—

> A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past. * * *
>
> * * * * *
>
> To justify an order restraining other violations it must appear that they bear some

[10] *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. at 437.

> resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past.[11]

Since most of the points on which petitioners relied below have been abandoned, the full scope of their resistance to the proxy rules is not apparent from the present petition. As appears from the opinions below, petitioners claimed, among other things, an unfettered discretion to keep *all* stockholder proposals from being acted upon at the annual meeting by the dubious device of excluding them from the notice of meeting. They argued that the proxy rules actually permitted them to do so, and that, if the rules did not, they were invalid. The scope of the injunction was no broader than the claim of the right to violate the rules.

3. It is said that the court below did not take account of changed circumstances, and it is asserted vaguely that its failure to do so is in conflict with decisions of this Court to the effect that an appellate tribunal should take account of changed circumstances (Pet. 13–15). This point was never urged on the court below, and is in any event without substance.

As previously noted, Gilbert's proposals were advanced in connection with the 1946 meeting, which the District Court ordered adjourned (after the transaction of ordinary business) pending de-

[11] *Id.*, 435, 437.

termination of the questions raised by the litigation. The District Court then ordered resolicitation on the auditor proposal, but stayed its mandate during the pendency of the appellate proceedings. The appeals were argued before the Circuit Court of Appeals several months prior to the 1947 meeting, and the imminence of the 1947 meeting was directed to the attention of that Court. The Circuit Court of Appeals did not render its decision until after the 1947 meeting, and then its decision in effect was that there should be resolicitation as to all of Gilbert's proposals. The fact that the 1947 meeting has intervened is the change of circumstances alluded to.

It is not claimed, nor could it be, that the holding of the 1947 meeting has rendered the controversy moot.[12] It is claimed only that some technical difficulties will be presented by reason of the fact that the 1947 meeting has already been held and that the body of stockholders is no longer the same as in 1946 (Pet. 15). The resolution of such difficulties, if they exist, can certainly be undertaken by the District Court, subject to the supervision of the Circuit Court of Appeals. Since those courts have not even been asked to resolve these problems there is no warrant for

[12] See *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 514–16; *McGrain* v. *Daugherty*, 273 U. S. 135, 180–82; *Boise City Irr. & Land Co.* v. *Clark*, 131 Fed. 415, 418–19 (C. C. A. 9).

now urging consideration of the problem by this Court.

4. It is said that the effect of the decision below is to repose in the Commission the power to dictate the terms of a notice of meeting even though proxy rules do not expressly specify what the notice must contain nor require it to be filed prior to solicitation (Pet. 9).

At the heart of the rules, of course, is the requirement of notice as to what will be done at the meeting. The Commission cannot undertake to anticipate, and to proscribe in its rules, every procedural device that may be employed to block stockholder action; in any race to find and plug loopholes the Commission would invariably lag behind the corporate bar. The proxy rules would be meaningless if affirmative rights granted by them to stockholders could be frustrated through procedural devices not expressly forbidden by the rules. Where such procedural devices are resorted to, the district courts, upon application by the Commission, and in the exercise of their equity jurisdiction, can make any decree reasonably necessary to effectuate the statutory rights under attack. That is all that happened here, and it is all that the complaint above described is directed to.

At most, the issue is one as to appropriateness of the particular remedy granted. The issue is not one of general importance and no conflict of decisions is claimed.

5. Even more insubstantial is the complaint that an amended notice of meeting was ordered to be sent to stockholders from whom no proxies had been solicited—namely, the 1,300 foreign stockholders out of Transamerica's total of 151,000 stockholders (Pet. 8). Transamerica does not object to the mailing of the notice of meeting to all stockholders of record, domestic or foreign. Indeed, its point is that this is a prerequisite under State law, to the holding of a valid meeting. We submit that once it be established that the Commission was warranted in insisting, for the purposes of controlling Transamerica's solicitation of proxies from domestic security holders, upon a notice of meeting broad enough to include Gilbert's proposals, it is immaterial that compliance with this requirement incidentally affects the scope of the notice of meeting sent also to foreign security holders.[13]

To make the statutory rights involved fully effective, the District Court had no alternative but to order an amended notice of meeting to be sent to all the stockholders of Transamerica.

6. For the reasons stated above, that portion of the decree relating to the notice of meeting, like

[13] If there were any merit in this argument of Transamerica it would be possible for its management by arbitrarily deciding to refrain from soliciting a single security holder, domestic or foreign, to argue that this precludes any control over the content of the proxy material sent to the remaining security holders solicited by the management.

the decree as a whole, was an exercise of the District Court's jurisdiction, as set forth in Section 27 of the Act, "to enforce any liability or duty created by this title or the rules and regulations thereunder;" it was not, as petitioners mistakenly claim, the enforcement of a State-created right (Pet. 9–10). It is true that the Commission expressed the view in its early correspondence with the management that the use of the notice of meeting as a device for blocking stockholder action was in violation of Delaware law (R. 32a-33a). However, neither the Commission nor the court below relied upon that proposition, for the federal policy embodied in Section 14 (a) and the proxy rules issued thereunder was obviously paramount.

7. Only one of Gilbert's proposals—the "straight resolution" requiring the directors to send to the stockholders a summary of the proceedings at the annual meeting—is now claimed to be beyond the powers of the security holders under State law (Pet. 10). Because an expenditure of corporate funds is necessarily involved,[14] and because under Delaware law and the company's charter and bylaws "the management of Transamerica is vested in its directors" (Pet. 10), it is said that the matter is one within the exclusive domain of the directors. No authority is advanced in support of this novel position. The

[14] The management estimated the annual cost to be some $20,000.

proposal appears to be clearly within the general rule permitting stockholders to act upon matters concerning the internal government of the corporation, as distinct from the actual conduct of the corporate business.[15] At the most there is involved a narrow question of State law.

8. We have discussed all the points raised in the discussion of Reasons for Granting the Writs. We assume that the various additional arguments implicit in petitioners' Statement of the Case (Pet. 2–7) are not relied upon for purposes of the petition. They go to the contention that the requirements of Rule X–14A–7 are in effect optional with the management and that the petitioners therefore did not really violate the Rule. Although these arguments were vigorously pressed below, neither of the courts below deemed them sufficiently substantial to warrant discussion.

CONCLUSION

For the reasons stated, the petition for writs of certiorari should be denied.

Respectfully submitted.

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Solicitor,
Securities and Exchange Commission.

DECEMBER 1947.

[15] See *5 Fletcher on Corporations* (1931 Ed.) § 2097; 8 Id. §§ 4166–67, 4170–72, 4177–78.

U. S. GOVERNMENT PRINTING OFFICE: 1947